of the recent legislation looking toward a lessening of the huge dividends given by the company, it cannot be said with certainty that the value of the franchise did increase.

The Burden of Proof in Self-Defence.

In the recent case of *Commonwealth* v. *Palmer*,[1] the Supreme Court of Pennsylvania reaffirmed the doctrine, that "if the evidence clearly establishes the killing by the prisoner purposely, with a deadly weapon, an illegal homicide of some kind is established and the burden then falls upon the prisoner, and not on the commonwealth, to show that it was excusable as an act of self-defence." This doctrine has been consistently followed in this state since enunciated by Agnew, J.,[2] and obtains in many other jurisdictions.[3] It must be admitted that the courts of this state are consistent in placing upon the accused the burden of proving by a fair preponderance of evidence that he did not act maliciously or wilfully as in insanity,[4] drunkenness [5] or self-defence,[6] so as to overcome the presumption of intent employed to establish a *prima facie* case.

It is admitted by all that the act and the intent are essential elements of the crime—and that these elements must concur. Malice aforethought or premeditation and deliberation are necessary for murder in the first degree.[7] The prosecution must prove these elements beyond a reasonable doubt before the accused can be convicted.[8] Because of the difficulty of proving the mind of man, a presumption has been raised [9] to assist the prosecution. This presumption has been declared one of law and not of fact. By means of this presumption, the presumption of innocence is overthrown.

Thayer,[10] Wigmore,[11] Cooley,[12] Mr. Justice Harlan,[13] Mr.

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[1] 222 Pa. 299.
[2] 58 Pa. 9 (1868); *Ortwein* v. *Com.*, 76 Pa. 414 (1847).
[3] M'Naghtin's Case, 2 Cl. and F. 199 (1843).
[4] *Com.* v. *Drum*, 58 Pa. 9.
[5] *Com.* v. *Honeyman*, Add. 147 (1793).
[6] *Com.* v. *Crouse*, 4 Clark, 298 (1846).
[7] *Com.* v. *Hagerty*, Lewis' Abridgment, 402 (1847).
[8] Lewis' "Abridgment of Criminal Law," 397.
[9] *O'Mara* v. *Com.*, 75 Pa. 425.
[10] Thayer on Evidence, 380, 381, 382.
[11] Wigmore on Evidence, sec. 2501.
[12] *People* v. *Garbutt*, 17 Mich. 9.
[13] *Davis* v. *U. S.*, 160 U. S. 469.

Justice Gray [14] and many others say this doctrine of the burden of proof in affirmative defences cannot be sustained on principle. Such expressions as "an illegal homicide," "murder," an "unlawful act" or a "crime" are not correct in legal terminology when applied to the prosecution's case alone. That the accused confesses to the elements of any such offence and then sets up an affirmative defence of insanity, or self-defence, is not true in fact or theory. The pleadings and the facts show a denial of one of the elements necessary to the crime.[15] The act was either lawful or unlawful and the intent either such as produced a crime or no crime. There is no middle ground. Once the crime is proven or admitted, mitigation or pardon alone are proper. Excuse and justification cannot enter where the crime is established, but are properly employed to show there was no crime by way of denial and not by way of avoidance.

While it is eminently proper that the intent should be presumed to establish a *prima facie* case for the prosecution, the law does not then say that the acts were unlawful or constituted a crime unless the accused admits them. Ordinarily, an act is judged only when all the evidence is in and the accused has submitted his confession or defence; and it is for the jury to decide the character of the act from all the evidence.[16]

If the presumption of intent is one of law, then no amount of evidence in direct denial should be able to overthrow [17] it and the question of intent ceases to be an essential element of the crime. But if the presumption is one of fact, presumed in law, then such presumption should be as any other fact, to answer its proper purpose—to establish a *prima facie* case—but no more. The jury should then pass upon it, together with all the other facts and a reasonable doubt as to the existence of the intent should be a reasonable doubt as to the existence of any crime.[18] The burden of proof should remain on the prosecution throughout, while the necessity for the production of evidence may vary.

However, for a century or more this rule has obtained in some form in this state. Numerous jusrisdictions have adopted it in insanity and a less number in self-defence. The facility of proving the facts and circumstances of self-defence will justify the distinction made in some jurisdictions between it

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[14] *Com.* v. *Pomeroy,* Wharton on Homicide (2nd ed.), 753.

[15] *Dove* v. *State,* 3 Heiskill (Tenn.), 366 (1872).

[16] *Bunn* v. *State,* 62 N. J. L. 666 (1898).

[17] Thayer on Evidence, 380.

[18] *Plummer* v. *State,* 135 Ind. 308 (1893).

and insanity. Judicial experience, public policy and history may well justify this doctrine,[19] but principle and theory for its existence can hardly be found.

Conclusiveness of Judgment Against a Surety in a Suit Between Principal and Surety.

In *United States Fidelity and Guaranty Company* v. *Haggart*,[1] it was decided that a judgment obtained by the United States against a marshal and the Guaranty Company as sureties on his bond for the proper performance of his duties and those of his deputies, is conclusive evidence of the default of the deputies, in a suit by the Guaranty Company against the administratrix of the marshal's estate.

The Guaranty Company had paid the judgment of the first suit and then sued the marshal's estate (the marshal having died since the judgment) for reimbursement. The administratrix in defence found that the Guaranty Company was surety for the deputy that defaulted, on this deputy's bond to the marshal, but the only evidence that the administratrix offered of the fact of the deputy's default was the judgment in the action brought by the United States.

In holding the judgment to be conclusive evidence the Court cites two classes of cases to sustain the decision.

The first class contains cases in which the parties to the action were co-defendants in the former action, the judgment of which is sought to be put in evidence, and the point now in controversy between them was necessarily adjudicated in the prior action.[2]

In such a case the defendant in the second suit, having once contested the point, is forbidden to raise it again.

The second class of cases are those in which the parties have not been joined in the former suit, yet the judgment of that suit is evidence of the facts there adjudicated in a suit between them.

This situation may arise in two ways:

I. Where a surety is sued by the creditor and pays the judgment. The surety then sues the principal for reimbursement and puts in evidence the judgment by the creditor against him.

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[19] Wharton on Homicide (3rd ed.), 550; Wigmore on Evidence, 2501; *Davis* v. *U. S.*, 160 U. S. 469.

[1] 163 Federal, 801 (1908), C. C. A.

[2] *Lloyd* v. *Barr*, 11 Pa. 41 (1849); compare *McMahon* v. *Geiger*, 73 Mo. 145 (1880).